Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-220

GENERAL DYNAMICS CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Petition for Rehearing

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on June 20, 1977, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. THE FILING OF A PETITION FOR REHEARING IN STENCEL AERO ENGINEERING CORPORATION V. UNITED STATES, NO. 76-321, OCTOBER TERM, 1976.

Petitioner's original Petition for a Writ of Certiorari was filed with this Court on August 13, 1976. Shortly thereafter, a Petition for a Writ of Certiorari to the United

States Court of Appeals for the Eighth Circuit was filed in *Stencel Aero Engineering Corporation v. United States of America,* No. 76-321 ("Stencel"), which petition was granted by this Court on or about November 15, 1976. The issue raised in *Stencel* is substantially the same issue raised in petitioner's original petition and petitioner herein believes the Court deferred action on this petition until the decision was rendered in *Stencel.* On June 9, 1977, this Court affirmed the judgment of the United States Court of Appeals for the Eighth Circuit in *Stencel,* and, on June 20, 1977, denied petitioner's Petition for a Writ of Certiorari. Stencel has filed with this Court a Petition for Rehearing, seeking reconsideration of this Court's opinion and decision of June 9, 1977. Because of the apparent controlling effect of that opinion and decision on petitioner's Petition for Writ of Certiorari, petitioner respectfully files this Petition for Rehearing, seeking a reconsideration of the denial of its Petition for Writ of Certiorari.

2. FOR THE REASONS SET FORTH IN THE DISSENTIING OPINION OF JUSTICES BRENNAN AND MARSHALL IN STENCEL AERO ENGINEERING CORPORATION V. UNITED STATES OF AMERICA, NO. 76-321, PETITIONER HEREIN SEEKS RECONSIDERATION OF THE DENIAL OF ITS PETITION FOR WRIT OF CERTIORARI.

The dissenting opinion filed by Justices Marshall and Brennan in *Stencel* makes it clear that the majority opinion in that case extended the reason and purpose of *Feres v. United States,* 340 U.S. 135 (1950) beyond its logical or necessary limit, and created a truly anomalous situation. The majority opinion extended the *Feres* doctrine, originally intended only to cover claims by members of the military against the United States of America, to all claims of any type against the United States of America arising, in any

fashion, out of a military context. By so doing, the majority opinion implies into the various military compensation schemes an exclusivity of remedy where none is expressed, despite the fact that this Court has, in the past, held that an express exclusivity provision in the comparable civilian employees compensation statutes [5 U.S.C. § 8116(c)] does not bar possible liability of the United States for indemnity to a third party sued by a civilian governmental employee. *Weyerhauser S.S. Co. v. United States,* 372 U.S. 597, 601 (1963); *Treadwell Construction Co. v. United States,* 372 U.S. 772 (1963). To expand the *Feres* doctrine to apply to a suit by a corporation against the United States of America for tort indemnity under the Tort Claims Act undercuts the reasoning of this Court in *United States v. Yellow Cab Co.,* 340 U.S. 543 (1951), and to do so on the ground that all matters arising in a military context are strictly "federal" in character runs afoul of the reasoning of this Court in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955).

As the dissenting opinion of Justices Marshall and Brennan further points out, under a hypothetical set of circumstances in which the negligence of the United States of America causes injury to a serviceman and to a civilian simultaneously, each of whom may sue a third party, the third party's potential liability may be indemnified by the United States of America as to damages assessed in favor of the member of the military. The analysis contained in the dissenting opinion indicates that the drawing of such a line on such a basis ignores the procedural, factual, and legal identity of both types of indemnity claims.

The inequity of such a conclusion is underscored by the fact that in both cases, the same facts would be at issue, the same discovery would be undertaken from the military, the same military witnesses would testify, and the same

liability principles should be applied as to the United States. Yet this Court, in the aforementioned majority opinion, impliedly allows the indemnity suit for damages assessed against a third party in favor of a civilian but denies such indemnity for the damages suffered by the serviceman. The reason expressed for this anomalous distinction is that any case arising in a military context is distinctly federal in character, and would be a disrupting influence in the conduct of the military, including military discipline. Such reasoning ignores the persuasive and compelling analysis of Justices Marshall and Brennan, as expressed above.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the Order of denial, vacate that Order, grant the Petition and review the judgment and opinion below.

Dated: July 12, 1977.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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